Hepting et al v. AT&T Corp. et al Doc. 94

Electronic Frontier Foundation
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May 1, 2006

Via Hand Delivery and Electronic Filing

Hon. Vaughn R. Walker
Chief Judge
United States District Court
for the Northern District of California
Courtroom 6
450 Golden Gate Avenue, 16th Floor
San Francisco, CA 94102

RE: *Hepting v. AT&T*, C-06-0672-VRW

Dear Judge Walker:

We write in accordance with the Court's Standing Order 1.5 to compel discovery. As the Court is aware, plaintiffs have a pending motion for preliminary injunction, which the Court has scheduled for hearing on June 21, 2006. In connection with that motion, plaintiffs have served a Rule 30(b)(6) notice of deposition and an associated document request on defendant AT&T Corp. These discovery requests were narrowly tailored to address only issues raised by the preliminary injunction motion, and not broader issues raised by the case as a whole. They were also only directed to one of the defendants, AT&T Corp. A copy of plaintiffs' 30(b)(6) notice is attached hereto. Plaintiffs noticed the document production for April 26, 2006 and the 30(b)(6) deposition for May 3, 2006.

Last week, the parties met and conferred regarding plaintiffs' discovery request. Defendants' position is that no discovery or Rule 26 initial disclosures should go forward until the Court has heard and decided defendants' motions to dismiss, which they filed Friday, April 28, 2006. In conjunction with their motions to dismiss, defendants have filed an administrative motion to set the hearing of their motions to dismiss for June 8, 2006, in advance of the hearing on plaintiffs' preliminary injunction motion. Plaintiffs will be filing their opposition to defendants' administrative motion within the time set by Local Rule 7-11.

Defendants believe that discovery is unnecessary and wasteful because the Court will grant their motions to dismiss and thereby moot plaintiffs' preliminary injunction motion. In its statement of interest filed on April 28, 2006, the government has also requested that no discovery go forward in advance of the Court's hearing and decision of the state secrets motion the government intends to file on May 12, 2006. Neither the defendants nor the government have moved for a protective order.

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The limited discovery plaintiffs seek is highly relevant to the issues raised by plaintiffs' preliminary injunction motion and is also relevant to the arguments in defendants' motion to dismiss. The preliminary injunction motion contends that, together with the government, defendants are conducting massive suspicionless searches of many millions of domestic as well as foreign communications passing through their hands—a surveillance program far broader than the one admitted to by the government so far, which is purportedly limited to foreign communications in which there is a reasonable suspicion that either the sender or the receiver is connected to Al Qaeda. The motion also contends that defendants have received no court order or other judicial authorization for this broader program, and that defendants have received no executive branch authorization that comports with the Foreign Intelligence Surveillance Act, the Wiretap Act, or any other congressionally-established procedure. By the discovery they have served, plaintiffs seek to further confirm the broad scope of the suspicionless surveillance defendants are facilitating and to establish the absence of any judicial authorization and the absence of any lawful executive branch authorization comporting with any statutory procedure. Specifically, the document request seeks any purported certifications under any of the relevant statutes or other authorizations from the government concerning any interceptions of customer communications without a court order.

After reviewing defendants' motions to dismiss, plaintiffs also believe that defendants' confidence in the certainty that their motions will be granted is unwarranted, to say the least. The main argument in the motion to dismiss brought by defendant AT&T, Corp. is that any surveillance they conducted was authorized by law, making them immune from liability. It is because of the tremendous gravity of the constitutional issues presented by this case that it is all the more important that procedurally the case should proceed as any other case does, where discovery goes forward while defendants make their motions to dismiss or other defensive motions. Experience has shown time and again that contorting the ordinary discovery and scheduling procedures to slow down the case pending consideration of a defendant's "sure-fire" dispositive motion only ends up unnecessarily delaying progress towards a resolution on the merits and increasing the burdens on the parties and the Court in the long run. We also note that the discovery seeks information only from AT&T Corp., not from AT&T, Inc., which has raised a jurisdictional challenge.

Given the briefing schedule set by the Court, in which plaintiffs' reply brief on their preliminary injunction motion is due May 25, 2006, the discovery sought by plaintiffs must go forward soon if it is to be available for use in the preliminary injunction proceedings. For that reason, plaintiffs respectfully request that the Court consider the matter by holding a telephone conference with the parties, and that for the reasons stated above the Court direct that the 30(b)(6) go forward and documents requested be produced.

Respectfully submitted,

Cindy A. Cohn
Electronic Frontier Foundation

Reed Kathrein
Lerach Coughlin Stoia
Geller Rudman & Robbins LLP

Encl 30(b)(6) Notice

cc: Opposing Counsel
via electronic filing

David Carpenter
David Lawson
Sidley Austin Brown & Wood
via email

The Electronic Frontier Foundation

April 7, 2006

Pillsbury Winthrop Shaw Pittman LLP
Bruce A. Ericson
50 Fremont Street
San Francisco, CA 94105

Re: Hepting v. AT&T C-06-0672-VRW
By personal delivery

Dear Bruce:

We would like to schedule some early, targeted discovery related to our motion for a preliminary injunction. Attached please find a notice of deposition under FRCP 30(b)(6) for AT&T employees who can testify regarding issues related to our motion.

Can we set up a time to discuss scheduling these depositions, as well as an agreement to ensure that we can conduct a broader, non-overlapping 30(b)(6) deposition later and obtain the additional supporting documents that we requested in the 30(b)(6) notice? As you might expect, we would like to complete this limited discovery prior to May 25, 2006, when our reply brief in support of our preliminary injunction motion is due.

Although we have set the deposition to begin on May 3, 2006, we are willing to change the date to a more convenient time for you and your clients, so long as it is consistent with our being able to use the deposition transcripts as part of our reply memorandum. We are also willing to discuss the subject of scheduling discovery with respect to Plaintiffs' declarants.

As we mentioned in our letter to you of Wednesday, we are of course open to discussions about an appropriate protective order.

Sincerely,

Lee Tien

Lee Tien

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